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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/673,142
Filing Date: September 30, 2003
Appellant(s): CREEDLE ET AL.

Van C. Ernest
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 07/21/08 appealing from the Office action mailed 04/16/08.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

No amendment after final has been filed.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

"Primavera launches PrimeContract for the Construction Industry; PrimeContract Streamlines E-Commerce, Collaboration, Collaboration and Project Control via the Internet", Business Wire, Nov. 29, 2000, pp. 1-3 (Primavera)

SK Drywall v. Developers Financial, as summarized in the Arizona Business Gazette, 11/8/1991, pp 52 (SK Drywall)

"Retainage, what is it?", New York State Office of the State Comptroller Accounting Bulletin A-191 R1., pp 1-2 (Ref A.)

Primavera PrimeContract Brochure, 9/25/2001, Primavera, pp1-3.

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 102

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 1 - 4, 6-7, 11- 24, 29 and 30-33 are rejected under 35 U.S.C. 102(b) based upon a public use or sale of the invention. Applicant's disclosure of their invention to two contractors and a subcontractor constituted a public use. The proper test for the public use prong of 102(b) statutory bar is whether the purported use (1) was accessible to the public; or (2) was commercially exploited. The display by applicants to prospective customers of a presentation outlining their claimed invention is indicative of commercial exploitation. See MPEP 2133.03, Cataphote Corp. v. DeSoto Chemical Coatings, Inc., 356 F.2d 24, 27, 148 USPQ 527, 529 (9th Cir. 1966).

3. Applicant has noted in their Supplemental Information Disclosure Statement, filed 9/12/2003, that a presentation of ideas underlying the invention was made to two contractors and one subcontractor for the purpose of gathering feedback and to determine whether such a product would be considered a useful tool in the industry, Page 3 - 4. By presenting the invention to members of the market for the invention, and inquiring as to whether the product would be useful in the industry, applicants were engaging in market testing by attempting to gauge consumer demand for their claimed invention. "The experimental use exception...does not include market testing where the inventor is attempting to gauge consumer demand for his claimed invention. The purpose of such activities is commercial exploitation and not experimentation." See MPEP 2133.03, In re Smith, 714 F.2d 1127, 1134, 218 USPQ 976, 983 (Fed. Cir. 1983).
4. It is noted that Applicant' has provided the presentation in conjunction with an IDS. Applicant has stated that the disclosure to the two software companies did not constitute a public use or sale for the purposes of 35 U.S.C. 102(b). Applicant has not provided any evidence supporting his assertions. Additionally, page 3 of the GCPay slides indicates that "Guests" were present at the presentation.
5. With respect to claim 1, see page 52.
6. With respect to claim 2, see page 52.
7. With respect to claim 3, see page 52.
8. With respect to claim 4, see page 40.
9. With respect to claim 6, see page 42.
10. With respect to claim 7, see page 42.

11. With respect to claim 8, see pages 41,42 and 45.
12. With respect to claim 9, see page 52.
13. With respect to claim 10, see page 52.
14. With respect to claim 11, see page 33.
15. With respect to claim 12, see pages 44 and 52.
16. With respect to claim 13, see page 52.
17. With respect to claim 14, see page 56.
18. With respect to claim 15, see pages 20 and 23.
19. With respect to claim 16, see page 21.
20. With respect to claim 17, see page 20.
21. With respect to claim 18, see page 32.
22. With respect to claim 19, see page 52.
23. With respect to claim 20, see page 52.
24. With respect to claim 21 see page 53.
25. With respect to claim 22, see page 61.
26. With respect to claim 23, see page 61.
27. With respect to claim 24, see page 52.
28. With respect to claim 25, see page 40.
29. With respect to claim 26, see page 52.
30. With respect to claim 27, see page 42.
31. With respect to claim 29, see page 59.
32. With respect to claim 30, see page 59.

33. Claims 1, 2, 4, 6-7, 28 - 30 and 31-33 are rejected under 35 U.S.C. 102(b) as being anticipated by "Primavera launches PrimeContract for the Construction Industry; PrimeContract Streamlines E-Commerce, Collaboration and Project Control via the Internet", Business Wire, Nov. 29, 2000, Pg. 1 (hereinafter referred to as "Primavera").

34. With respect to claim 1, Primavera teaches a method for administering performance of a contract using a server accessible by a plurality of performing parties through a data network, (Para. 8) the method comprising: receiving performance data at the server from at least one of the performing parties through the data network, the performance data indicating an amount of work performed under the contract by the at least one performing party (PrimeContract subscribers use a web browser to prepare, submit and negotiate progress payments, Para. 8); automatically calculating a contract markup amount based on the performance data (Contract details are entered one time using familiar forms, and subcontractors simply apply performance data against the defined schedule of values, Para.8); and determining a payment amount based on the performance data and the contract markup amount (subcontractors apply performance data against the defined schedule of values, Para. 8).

35. With respect to claim 2, Primavera teaches the method for administering performance of the contract, in which the network comprises a public Internet (subscribers use a web browser, Para. 8).

36. With respect to claim 4, Primavera teaches the method for administering performance of the contract, further comprising initially storing a schedule of values associated with performance of the contract, wherein determining the payment amount

is further based on comparing the performance data with the schedule of values (subcontractors apply performance data against the defined schedule of values, Para. 8).

37. With respect to claim 6, Primavera teaches the method for administering performance of the contract according, further comprising: sending the payment amount from the server to another one of the performing parties through the data network (agreement by the parties regarding payment and certification by a third party triggers payment, Para. 8; PrimeContract uses a web browser to negotiate monthly progress payments, Para. 8).

38. With respect to claim 7, Primavera teaches the method for administering performance of the contract further comprising: sending an electronic message to another one of the performing parties indicating that the payment amount has been determined; (PrimeContract notifies buyers and sellers via email, Para. 8) and receiving a request from the messaged party to receive the payment amount through the data network (interpreted to be the agreement between the buyer and seller that, once approved by a third party, triggers payment, Para. 8).

39. With respect to claim 28, Primavera teaches a system for enabling a contract payment process (PrimeContract subscribers use a web browser to prepare, submit and negotiate monthly progress payments, Para. 8), comprising:

- a. a database for storing data relating to each of a plurality of users, the data comprising an account number corresponding to each user (interpreted to be the contract details, Para. 9); and

- b. a computer for receiving via a communications network a payment request from at least one user of the plurality of users, the request for payment being based on performance of at least a portion of the contract by the user (PrimeContract subscribers use a web browser to prepare, submit and negotiate monthly progress payments, Para. 8); wherein an electronic payment directed to the account number corresponding to the user is initiated in response to the payment request when the payment request is approved (after the buyer and seller agree on the proper payment for progress that period, payment is triggered after certification by a third party, Para. 8).
40. With respect to claim 29, Primavera teaches a system, wherein the server is configured for tracking a status of completion of work under the contract based, at least in part, on the performance of at least a portion of the contract by the user (interpreted to be the disclosure that PrimeContract notifies buyers and sellers via email that the other party has responded to the latest declaration of progress, thereby tracking the status of completion of work under the contract, Para. 8).
41. With respect to claim 30, Primavera teaches a system, wherein the server is configured for sending or receiving information to the at least one user via e-mail, the information relating to at least one of a draw, an inspection and an approval (PrimeContract notifies buyers and sellers via email that the other party has responded to the latest declaration of progress, Para. 8).
42. With respect to claim 31,

43. Primavera teaches a method for administering performance of a contract using a server accessible by a plurality of performing parties through a data network, the method comprising:

- c. receiving performance data at the server from at least one of the performing parties through the data network, the performance data indicating an amount of work performed under the contract by the at least one performing party (PrimeContract subscribers use a web browser to prepare, submit and negotiate progress payments, Para. 8);
- d. determining a payment amount based on the performance data (Contract details are entered one time using familiar forms, and subcontractors simply apply performance data against the defined schedule of values, Para.8); and
- e. sending the payment amount from the server to another one of the performing parties through the data network (PrimeContract subscribers use a web browser to prepare, submit and negotiate progress payments, Para. 8).

44. With respect to claim 32,

45. Primavera teaches a method, further comprising:

- f. sending an electronic message to the other one of the performing parties indicating that the payment amount has been determined (PrimeContract notifies buyers and sellers via email, Para. 8); and
- g. receiving a request from the other one of the performing parties to receive the payment amount through the data network, wherein the payment amount is sent from the server to the other one of the performing parties through the data

network in response to the received request (interpreted to be the agreement between the buyer and seller that, once approved by a third party, triggers payment, Para. 8).

46. With respect to claim 33,
47. Primavera teaches wherein sending the payment amount from the server to another one of the performing parties through the data network comprises sending an electronic payment to a predetermined account of the other one of the performing parties (interpreted to be the agreement between the buyer and seller that, once approved by a third party, triggers payment, Para. 8).

Claim Rejections - 35 USC § 103

48. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

49. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

50. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

51. Claim 3 is rejected under 35 U.S.C. 103(a) as being unpatentable over Primavera in view of SK Drywall v. Developers Financial, as summarized in the Arizona Business Gazette, 11/8/1991, (hereinafter referred to as "SK Drywall").

52. With respect to claim 3, Primavera does not specifically teach where the performance data further comprises an amount of materials stored. Although Primavera does not provide an exhaustive or exclusive definition of performance data, SK Drywall teaches that the performance data from which progress payments are based includes completed labor, materials, and equipment costs (See (i)). SK Drywall thereby teaches that performance data includes the amount of materials stored on a construction site. It would have been obvious to a person having ordinary skill in the art at the time the invention was made to include the amount of materials stored in the definition of performance data in order to provide a more useful and efficient method of administering a contract over a data network as performance data is understood in the industry to include the amount of materials stored, as evidenced by SK Drywall.

53. Claim 11 is rejected under 35 U.S.C. 103(a) as being unpatentable over Primavera in view of "Retainage, what is it?", New York State Office of the State Comptroller Accounting Bulletin A-191 R1, hereinafter referred to as Ref. A.

54. With respect to claim 11, Brochure does not specifically teach the method for administering performance of the contract in which determining the payment amount is further based on a retainage amount, the retainage amount being a predetermined percentage applied to the application for payment. Brochure teaches the ability to make adjustments to the progress payments (interpreted to be inherently disclosed as Brochure teaches the ability to add mark-ups to progress payments, see (i)). Ref. A teaches that retainage is the amount that is temporarily withheld from contract payments to ensure that a contractor will perform as agreed (see (a)). It would have been obvious to a person having ordinary skill in the art at the time the invention was made to apply the concept of retainage to the method of Brochure in order to provide a more complete and efficient progress management tool as described in Brochure.

55. Claims 12 - 24 and 34-37 are rejected under 35 U.S.C. 103(a) as being unpatentable over Primavera, as evidenced by Brochure.

56. With respect to claims 12 and 34, Primavera teaches a method and computer readable medium storing a computer program for administering performance of a project using a web server accessible through a packet switched data network (subscribers use a web browser to prepare, submit and negotiate monthly progress payments, Para. 8), the method comprising:

- h. receiving at least one subcontract schedule of values via the packet switched data network, the subcontract schedule of values comprising a plurality of subcontract line items (subcontractors apply performance data against a defined schedule of values, Para. 8);
- i. receiving at least one subcontract application for payment via the packet switched data network, the subcontract application for payment including the subcontract line items (subscribers ... submit and negotiate monthly progress payments, Para. 8);
- j. creating a general contract schedule of values relating to the project, the general contract schedule of values comprising a plurality of general contract line items (subcontractors apply performance data against a defined schedule of values, Para. 8);
- k. Primavera does not specifically teach: receiving associations between the subcontract line items of each subcontract schedule of values and the general contract line items of the general contract schedule of values; updating the general contract line items based on information in the associated subcontract line items received in the subcontract application for payment; and creating a general contract application for payment based on the updated contract line items; Wherein the general contract application for payment automatically determines a total performed work amount and a payment amount due based on the total performed work amount.

- I. Even though Primavera does not specifically teach receiving associations between the subcontract line items and schedule of values and updating the general contract line items based on the payment application and determining total work performed based on the applications, it would have been obvious to a person having ordinary skill in the art at the time the invention was made to apply the same methods of Primavera to progress payments between a general contractor and an owner or other similar entity in order to more efficiently track the progress of construction and effectuate prompt and accurate payments thereof.
57. With respect to claim 13, Primavera teaches a method for administering performance of the project, further comprising submitting the general contract application for payment via the packet switched data network (subscribers use a web browser to prepare, submit and negotiate monthly progress payments, Para. 8).
58. With respect to claim 14, Primavera teaches a method for administering performance of the project, further comprising receiving an approval of the general contract application for payment via the packet switched data network (buyers and sellers are notified via email that the other party have responded to the latest declaration of progress, and they thereafter may agree on the proper payment for the progress that period, Para. 8).
59. With respect to claims 15 and 35, Primavera teaches a method and computer readable medium storing a computer program for administering performance of the project further comprising initially creating a project profile and assigning roles to

participants, including the at least one subcontractor and at least one of an owner and an architect (interpreted to be the disclosure that PrimeContract ... enables facility owners and their engineers and contractors to collaborate over the internet, Para. 16).

60. With respect to claims 16 and 36, Primavera teaches a method and computer readable medium storing a computer program for administering performance of the project in which assigning roles comprises selecting at least one of the participants from a database accessible by the web server (interpreted to be inherently disclosed as the reference teaches that PrimeContract ... enables facility owners and their engineers and contractors to collaborate over the internet, Para. 16, and those respective roles must be selected from sort of database).

61. With respect to claim 17 and 37, Primavera teaches the method and computer readable medium storing a computer program for administering performance of the project in which assigning roles comprises identifying a proxy to represent the at least one of the participants, wherein the subcontract schedule of values and the subcontract application for payment are received from the proxy (interpreted inherently disclosed as PrimeContract ... enables facility owners and their engineers and contractors to collaborate over the internet, Para. 16, and the recognized definition of 'proxy' is a person authorized to act for another, as evidenced by the definition of proxy in Credo Reference. Therefore, a facility owner, their engineers or contractors could identify a proxy to represent them).

62. With respect to claim 18, Primavera teaches a method for administering performance of the project in which the subcontract schedule of values is based on a

predetermined template accessible through the packet switched data network (interpreted to be the disclosure that contract details are entered one time using familiar forms -i.e. templates, Para. 8).

63. With respect to claim 19, Primavera does not specifically teach the change order process in which creating the general contract application for payment is further based on a change order corresponding to at least one of the general contract schedule of values and the at least one subcontract schedule of values. However, PrimeContract does have change order capabilities, as evidenced by Brochure, which describes the change order process of PrimeContract, see (ii) and (iii)).

64. With respect to claim 20, Primavera teaches a method for administering performance of the project according to claim 12, in which creating the general contract application for payment includes entering at least one of a work completed amount and a material presently stored amount (Primavera provides that subcontractors simply apply performance data, i.e. work completed or material presently stored amount, against a defined schedule of values, Para. 8. It would have been obvious to a person having ordinary skill in the art at the time the invention was made to apply the same methods of Primavera to progress payments between a general contractor and an owner or other similar entity in order to more efficiently track the progress of construction and effectuate prompt and accurate payments thereof.

65. With respect to claim 21, Primavera does not specifically teach a method for administering performance of the project, in which entering at least one of the work completed amount and the material presently stored amount is performed automatically

based on the subcontract application for payment. It would have been obvious to a person having ordinary skill in the art at the time the invention was made to incorporate changes based on subcontractor application for payments into the general contract automatically in order to provide a more efficient method of administering the contract between the general contractor and the owner.

66. With respect to claim 22, Primavera does not specifically teach a method for administering performance of the project, in which entering at least one of the work completed amount and the material presently stored amount comprises receiving a dictated amount, different than the at least one of the work completed amount and the material presently stored amount, via the packet switched data network. However, it would have been obvious to a person having ordinary skill in the art at the time the invention was made to incorporate changes in a dictated fashion, allowing modifications, rather in an automatic fashion, in order to allow changes to be made in payment negotiations, as Primavera teaches that monthly progress payments may be negotiated, and therefore subject to some sort of manual adjustment, Para. 8, it is also well known in the art to provide a method or means to change data that was incorrectly entered.

67. With respect to claim 23, Primavera does not specifically teach the method for administering performance of the project, further comprising modifying the received subcontractor application for payment before updating the general contract line items, based on permission to modify the received subcontractor application received via the packet switched data network. However, PrimeContract does provide the feature of

modifying the subcontractor application for payment, as evidenced by Brochure, in the change order process of PrimeContract, see Brochure (ii) and (iii). Primavera teaches that a variety of users are present in the system - facility owners, engineers, and contractors, Para. 6. It would have been obvious to a person having ordinary skill in the art at the time the invention was made to incorporate the features of a third party being able to certify the application into Primavera in order to make a more efficient and useful product.

With respect to claim 24, Primavera teaches a method for administering performance of the project, in which the packet switched data network comprises a public Internet (subscribers use a web browser, Para. 8).

(10) Response to Argument

With respect to the rejection of claims 1-4, 6-7, 11-24, 29 and 30-33 under 35 U.S.C. § 102(b) based on public use or sale of the invention, Examiner respectfully disagrees. MPEP 2133.03(e)(6) states, "Experimentation to determine product acceptance, i.e., market testing, is typical of a trader's and not an inventor's experiment and is thus not within the area of permitted experimental activity. *Smith & Davis Mfg. Co. v. Mellon*, 58 F. 705, 707 (8th Cir. 1893) Likewise, testing of an invention for the benefit of appeasing a customer, or to conduct "minor 'tune up' procedures not requiring an inventor's skills, but rather the skills of a competent technician," are also not within the exception. *In re Theis*, 610 F.2d 786, 793, 204 USPQ 188, 193-94 (CCPA 1979)." Inventor's declaration filed September 30, 2003, states, at bullet 14, that there were two

general contractors and one subcontractor (Hereinafter referred to as Guests) present at a meeting on March 16th 2001 (more than one year prior to applicant's filing date), where at bullet 7, inventor describes said meeting to gather feedback regarding the present invention. Examiner believes this meeting to have included market testing relating to the invention in an effort to increase sales and appeal.

After reviewing the and The Declaration of Sherwood Creedle filed on September 30, 2003 under 37 CFR 1.131 has been considered but is ineffective to overcome the GCPay reference.

With respect to the rejection of claims 1-4, 6-7, 11-24, 29 and 30-33 under 35 U.S.C. § 102(b) depending on the PowerPoint presentation not being a printed publication, Examiner respectfully disagrees. MPEP 2128.01 states, "Documents and items only distributed internally within an organization which are intended to remain confidential are not "printed publications" no matter how many copies are distributed. >There must be an existing policy of confidentiality or agreement to remain confidential within the organization. Mere intent to remain confidential is insufficient.< In re George, 2 USPQ2d 1880 (Bd. Pat. App. & Inter. 1987) (Research reports disseminated in-house to only those persons who understood the policy of confidentiality regarding such reports are not printed publications even though the policy was not specifically stated in writing.); Garret Corp. v. United States, 422 F.2d 874, 878, 164 USPQ 521, 524 (Ct. Cl.1970). Here, the Guests were not member of the inventor's organization nor has there been any proof of an agreement to remain confidential. Further, there is no

indication on the GCPay reference anywhere that the document was confidential. Thus, a mere intent to remain confidential is insufficient.

The GCPay reference is a statutory bar under 35 U.S.C. 102(b) and thus cannot be overcome by an affidavit or declaration under 37 CFR 1.131.

With respect to applicant's argument regarding claim 1, Examiner respectfully disagrees. After reviewing applicant's specification, Examiner has determined calculating a markup is contained within the corresponding scheduled valued which is disclosed in the Primavera reference. The Primavera reference discloses at Paragraph 8, "Contract details are entered one time using familiar forms, and subcontractors simply apply performance data against the defined schedule of values." Specifically, [0110] of applicant's specification states, "For example, the \$11,000 allocated for line item 103a includes an exemplary ten percent markup on the subcontractor's work. In other words, the subcontractor had scheduled \$10,000 for this work and the general contractor added a \$1,000 markup (ten percent) in its corresponding scheduled value." Thus, Primavera discloses a markup.

With respect to applicant's argument regarding claim 28, Examiner respectfully disagrees. Primavera discloses a database at Paragraph 7, which stores and monitors communications and at Paragraph 9 which processes account information in order to payments. Thus, Primavera meets the claimed limitation of a database which is a collection of logically related data stored together in one or more computerized files.

With respect to applicant's argument regarding claim 31, Examiner respectfully disagrees. Examiner believes he has examined the claims consistent with the

specification. Referring to applicant's specification at [0015], " The method may further include initially storing a schedule of values associated with performance of the contract, so that determining the payment amount is further based on comparing the performance data with the schedule of values." .

With respect to applicant's argument regarding claims 12 and 34 , Examiner respectfully disagrees. In reference to line item, referring to applicant's figure 5 or page 32 of GCPay, a line item is the contained on the form which Primavera discloses as "Contract details are entered one time using familiar forms" and all the subcontractor need include is a description which Primavera discloses as "Contract details" and a scheduled value. In reference to Examiner's maintains his 103 position, that it would be obvious to use the same methods of Primavera to progress payments between a general contractor and an owner or other similar entity in order to more efficiently track the progress of construction and effectuate prompt and accurate payments thereof, since so doing could be performed readily and easily by any person of ordinary skill in the art, with neither undue experimentation, nor risk of unexpected results.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Matthew S. Meyers/

Examiner, Art Unit 3689

Conferees:

/Janice A. Mooneyham/

Supervisory Patent Examiner, Art Unit 3689

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